RACING APPEAL PANEL OF NEW SOUTH WALES

APPEAL OF JEFF KEHOE

Panel: Mr R Beasley SC, Principal Member; Mr J Murphy; Mr P Losh

Appearances: For the Stewards: Mr M Van Gestel.

For the Appellant: Mr T Crisafi

Date of Hearing: 1 September 2021

Date of Reasons: 1 September 2021

REASONS FOR DECISION

Mr R Beasley SC, for the Panel

Introduction

1. On 31 July 2021, licensed jockey Jeff Kehoe (the appellant) rode the horse "Rapid Eagle" in Race 5 run at Moree that day. The race was run over 1400m, and Rapid Eagle started at $8.50. The horse missed the start badly, but rounded the field from about the 1300 metres to the 900 metres, where it joined the then leader, "Helcolore". Rapid Eagle then continued to "roll along" in front from the 900m until about the 550-metre mark. From that point the horse was ridden forward with vigour, took a lead of at least 2 lengths into the straight, but ultimately faded on its run to finish 6th. A stablemate, "Hardyo", the favourite, came from well back on the turn to win.

2. The Stewards conducted an Inquiry into the appellant's ride following the race, and took evidence on 31 July and 20 August 2021. On the later date, the appellant was changed with a breach of **AR 129(2)** of the Australian Rules of Racing, which is in the following terms:

   A rider must take all reasonable and permissible measures throughout the race to ensure that the rider's horse is given full opportunity to win or to obtain the best possible place in the field.

3. The two key particulars alleged in support of the charge were as follows:

   Particular 1: *That after being slow to begin you allowed Rapid Eagle to improve around the field and obtain a position outside the leader Helcolore where you then failed to make sufficient effort to restrain Rapid Eagle and ease the gelding to set a sustainable speed when it was both reasonable and permissible to do so.*

   Particular 2: *That after passing the 500m you then rode Rapid Eagle forward when it was both reasonable and permissible to refrain from pressuring Rapid Eagle from that point in order to afford your mount some respite bearing in mind the fast tempo of the early and middle stages as well as the extra covered by Rapid Eagle.*

4. These particulars must be considered in the context of the race up to the point of the 900-metre mark: that context being that the horse had missed the start, and had to round the field to reach the leader. It had thus expended considerable energy to this point of the race.

5. The appellant pleaded not guilty to the alleged breach of the rule, but was found guilty by the Stewards. He was penalised with a 3-week suspension of his licence to ride. He has appealed both the finding of breach, and the severity of penalty imposed. At the appeal hearing, he was represented by the CEO of the Jockeys Association, Mr T Crisafi. The Stewards were represented by the Chairman of Stewards, Mr M Van Gestel. The evidence on appeal comprised an appeal book containing the transcript of the Stewards' Inquiry, and film of the race. A document analysing the speed of this

race was also tendered, which indicated that the speed was well above average for this meeting up to the 600-metre mark. The Panel was told there were no integrity issues involved. The appellant also gave oral evidence.

Agreed facts

6. The following matters were accepted or not in dispute:
   (a) The appellant has been a licensed jockey for about 20 years, riding primarily outside the metropolitan area. He has a very good record, with no prior breaches of AR129(2), and only about a dozen breaches of the careless riding rule.
   (b) The appellant had not ridden Rapid Eagle before. His instructions from the trainer were that the horse can be a "handful" to ride, and to "let him slide" if he starts to hang. He was told to lead, as this was the horse's usual racing pattern. Other jockeys advised the appellant that the horse has a tendency to hang out or shift out if restrained, and was difficult to ride.
   (c) Rapid Eagle missed the start by 2 lengths. It was allowed to run forward or roll on, and caught the leader at the 900m.
   (d) The horse continued to roll forward from the 900m, with not much effort made by the appellant to restrain the horse.
   (e) At about the 550m mark, the appellant started to ride with full vigour. At this point, to use his words, he "pushed the button".

Construction of AR129(2)

7. The leading decision about how to construe and apply this rule remains the *Appeal of Munce* (5 June 2003). In this appeal the then Principal Member, Mr TEF Hughes QC, said that a rider should not be found to be in breach of the rule unless the Panel is *"comfortably satisfied that the person charged was guilty of conduct that, in all the relevant circumstances, fell below the level of objective judgement reasonably to be expected of a jockey in the position of the person charged"*. As to the relevant circumstances, Mr Hughes said they would include:

   (a) the seniority and experience of the rider charged;

   (b) the competitive pressure they were under in the race; and

(c) whether they had to make a sudden decision between alternative courses of action.

8. As stated in the Appeal of Ms K O'Hara (25/3/21) at [7], these should be considered to be inclusive factors, not exclusive. The rule is not designed to find jockeys to be in breach of the rule *"who make errors of judgement unless those errors are culpable by reference"* to the various circumstances relevant to the race and the conduct. As the Panel said in *The Appeal of Bowman* (24 September 2020), the rule should not be given an entirely literal construction. Any error by a rider might as a matter of logic - even a minor one - mean that the rider has not taken "all reasonable and permissible measures" to ensure a horse is given full opportunity to win or obtain the best possible placing. But not every error is caught by the rule. It requires the application of judgment, common sense, and a reasonable consideration of all the factors that are relevant to a particular error or lapse of judgment in deciding whether that error is culpable under AR 129(2). While it is crucial to the integrity of the sport that riders ride in a manner that does give full opportunity to their mount to win or obtain its best place in a race, it is also important that this Panel show appropriate restraint and judgment in making determinations about whether AR 129(2) has been breached. Riders, like other professional sportspeople, are going to make errors. Not all of these errors should be judged to be errors that result in a finding that the rule has been breached. The error has to be a bad one, or too many jockeys will be penalised under the rule.

9. The onus of persuading the Panel that the rule has been breached is on the Stewards, to the standard of balance of probabilities, but with what is known as the "Briginshaw"[1] gloss: The Panel must be "comfortably satisfied" that the rule has been breached.

Submissions

10. Mr Van Gestel correctly submitted that the conduct outlined in both key particulars needed to be assessed in the context of what had happened in the race up to the 900m – the horse had already worked hard to join the leader. As to the first particular, he said that it was incumbent on the appellant at the 900m to at least attempt to restrain

[1] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336

Rapid Eagle somewhat, rather than let it stride forward and past Helcolore. Instead, the horse was allowed to continue at an unsustainable pace. As to the second particular, Mr Van Gestel submitted that while the appellant was not required to restrain the horse at the 500m, the proper course of action was for him to wait until the horse entered the straight before riding with full vigour. Instead, by in effect asking the horse for its maximum effort from the 550-500m, he deprived the horse the chance of finishing the race off, and hence finishing in its best possible placing.

11. Mr Crisafi submitted that the appellant's ride to the 550m was entirely reasonable, in accordance with his instruction, and in keeping with the advice he had been given about this horse. It likes to lead. It does not like being restrained. In fact, restraining the horse would likely have been counter-productive, as the horse would have been at real risk of shifting out significantly. As to the second particular, Mr Crisafi had to concede an element of error, as the appellant had done so himself when questioned by Mr Van Gestel. Mr Crisafi submitted however that the appellant made a "split second" decision to go forward on the horse, and to try and win the race from the 500m. If error was involved, it was not a culpable one under the rule properly construed.

Mr Murphy and Mr Losh

12. Mr Murphy and Mr Losh are of the view that no finding of breach of AR 129(2) is made out on particular 1 to the charge. While in totality the ride of the appellant on Rapid Eagle may not be one of his best, the decision to allow the horse to pass the field and roll past the leader at the 900m without attempting to restrain it was reasonable in light of the riding instructions given to the appellant, and the information he had about the horse's racing manners, particularly the tendency to shift out if restrained.

13. As to the second particular, both Mr Murphy and Mr Losh consider that it would have been preferable for the appellant to wait up to another 100 metres before commencing to ride the horse with full vigour as he did passing the 500m. That was an error. However, they are not comfortably satisfied that it is an error of sufficient degree that it is in breach of AR129(2) as that rule should be understood in light of the Munce,

Bowman and *O'Hara* decisions. They view the ride from the 550m mark as involving an error of judgment that falls (just) short of culpability under the rule.

Principal Member

14. As to particular 1, I agree with the other Panel members, and for the same reasons. I respectfully differ from them as to particular 2. In my view, coming to the 550m mark, the appellant had an opportunity to roll forward on Rapid Eagle, without immediately riding it with the vigour he did. I consider this was a culpable error under the rule in light of the fact that the horse had been required to round the field having missed the start, and had proceeded to go well clear of Helcolore from the 900m without real vigour being shown by the appellant. I consider he should have kept riding that way until entering the straight, rather than "pushing the button" at the 550m. While there have been and will be more serious breaches of AR129(2), in all the circumstances – which include the hard run the horse had had, and the experience of the appellant – the proper and reasonable course for the appellant to take was to wait at least a further 100m before fully testing his mount. I would therefore have dismissed the appeal. In saying that however, I consider the different view the other Panel members have as being entirely rational, and based on the evidence. It is just a different view on the facts.

Orders

15. By majority then, this appeal must be allowed. The orders are as follows:

1. Appeal allowed.

2. Finding of breach of AR 129(2) set aside.

3. Penalty of a 3-week suspension set aside.

4. Appeal deposit to be refunded.